In the Supreme Court of the United States

(October 1925 Term)

No. ----

JOHN LEWALLEN and LUCY CONDREN, *Plaintiffs in Error,*

vs.

B. A. MARLIN, *Defendant in Error.*

To the Honorable, the Supreme Court of the United States:

The petition of B. A. Marlin respectfully shows to the Court as follows:

The petitioner, B. A. Marlin seeks in this action to recover possession of certain real estate in the State of Oklahoma, for a partition of said real estate, and damages for withholding same, and for rents and profits for withholding same.

This action was brought in the district court within and for McIntosh County, State of Oklahoma. The trial in the district court resulted in a judgment for your petitioner, adjudging that your petitioner was the owner of an undivided two-thirds interest in said property, and a judgment in his favor from the defendant, John Lewallen, in the sum of Eleven Hundred Fifty

($1150.00) Dollars as rents and profits. It was further adjudged and decreed that a partition of sale of the said property be made accordingly, which said judgment was rendered on the 12th day of April, 1922. The case was taken by writ of error to the Supreme Court of the State of Oklahoma, which court, on the first day of January, 1926, finally reversed the judgment of the district court, which in effect ordered the district court to render judgment for the plaintiff in error and against your petitioner. The mandate went down on the 9th day of January, 1926.

Your petitioner is advised that the Supreme Court of the State of Oklahoma was in error in ordering judgment to be entered for the plaintiff in error and against this defendant in error below, but should have affirmed the judgment and decree of the district court.

Your petitioner presents herewith as part of this petition, the essential part of the transcript of the record in the Supreme Court of the State of Oklahoma.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of Oklahoma, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and the proceedings of said Supreme Court of Oklahoma, in this case which was determined in that court, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate, and that the said judgment of the Supreme Court of Oklahoma may be reversed by this Honorable Court.

Your petitioner further shows that inasmuch as

the facts are all before the Court, justice can be done and delay and expense can be saved by entering an order reversing the judgment of the Supreme Court of the State of Oklahoma.

It is submitted that the principle of law has been settled, in the case of *Campbell* vs. *Wadsworth*, 148 U. S. 169 and that there is sufficient before the court to enable it to make the order prayed for without a certiorari and sending up the record in obedience thereto.

Wherefore, your petitioner prays in the alternative, that an order be issued out of and under the seal of this Court, directing that the opinion and judgment of the Supreme Court of Oklahoma be reversed.

S. P. Freeling, S. P. Freeling
Claude O. Niles,
Attorneys for Petitioner B. A. Marlin.

TRANSCRIPT OF RECORD

I.

PETITION OF THE PLAINTIFF

In the District Court within and for McIntosh County, State of Oklahoma.

No. ____

B. A. Marlin, Plaintiff,

vs.

Lucy Condren, nee Lewallen and John Lewallen, Defendants.

PETITION

Comes now the plaintiff, B. A. Marlin, by his attorneys, Niles and Staley, and for causes of action against defendants, Lucy Condren, nee Lewallen and John Lewallen, alleges and states:

First Cause of Action

Plaintiff alleges and states: that he has the legal estate in fee simple and the equitable estate in and to the following described real estate, situate in McIntosh County, State of Oklahoma, to-wit:

An undivided two-thirds interest in and to the south half of the northeast quarter and the

north half of the north half of the north half of the southeast quarter of section twenty-nine (29); and the south half of the south half of the southwest quarter of section ten (10); and the east half of the northwest quarter of the northwest quarter of section fifteen (15); all in township eleven (11) north, and range sixteen (16) east, same being the allotment of Louisa Lewallen, deceased, in the Creek Nation.

That plaintiff derived his title to said real estate as follows, to wit: that Louisa Lewallen, deceased, was a citizen by blood of the Muskogee or Creek Nation of Indians and that as such the said Louisa Lewallen was allotted as a homestead allotment that part of said above described real estate described as the southeast quarter of the northeast quarter of section twenty-nine (29), township eleven (11) north, and range sixteen (16) east, and that the principal chief of the Muskogee or Creek Nation executed to the said allottee a homestead patent dated the 12th day of March, 1903, which patent was duly approved by the Secretary of the Interior and was duly recorded in the office of the Commissioners to the Five Civilized Tribes in book I. at page 62, and that there was allotted to said Louisa Lewallen as her surplus allotment in said Muskogee or Creek Nation that part of the said above described real estate described as the southwest quarter of the northeast quarter and the north half of the north half of the north half of the southeast quarter of section twenty-nine (29), township eleven (11), north and range sixteen (16) east, and the south half of the south half of the southwest quarter of section ten (10), township eleven (11) north, and range sixteen (16) east, and the east half

of northwest quarter of the northwest quarter of section fifteen (15), township eleven (11) north, and range sixteen (16) east, and that the principal chief of the Muskogee or Creek Nation issued to said allottee an allotment patent conveying said last above described real estate, and which patent was duly approved by the Secretary of the Interior and recorded in book 12 at page 69 in the office of the Commissioners to the Five Civilized Tribes, copies of which homestead and allotment patents are hereto attached and made a part hereof and marked as "Exhibits A and B" respectively; that the said Louisa Lewallen died on the .. day of ....., 1904, and left surviving her as her sole and only heirs, her three daughters, to-wit: Nora Deer, now Nora Marlin, the wife of this plaintiff, Lucy Lewallen, now Lucy Condren, one of the defendants herein, and Lillie Lewallen, now Lillie Nelson; that said daughters were the only descendants which said Louisa Lewallen left her surviving; that on the 14th day of December, 1920, the said Lillie Nelson sold and conveyed her undivided one-third interest in and to said real estate to this plaintiff and on said 14th day of December, 1920, executed and delivered her warranty deed conveying said real estate to this plaintiff; that said last above mentioned deed is duly recorded in the office of the county clerk within and for McIntosh County, State of Oklahoma, in book 35 D at 450 and that a copy of same is hereto attached and made a part hereof and marked as "Exhibit C"; that thereafter, to-wit: on the 25th day of June, 1921, the said Lillie Nelson joined by her husband again deeded the above described real estate to this plaintiff; that thereafter on the 27th day of August, 1921, the said Lillie Nelson joined by her husband

gave an additional deed to this plaintiff, which deeds are recorded in the office of the county clerk of McIntosh County, State of Oklahoma, in book 36 at page 374 and in book 36 D at page 500, respectively, copies of which deeds are hereto attached and made a part hereof and marked as "Exhibits D and E"; that on the 17th day of September, 1921, the said Nora Marlin, *nee* Deer, executed and delivered to this plaintiff her warranty deed of that date conveying to this plaintiff her undivided one-third interest in and to said real estate, which said deed is recorded in book 36 D at page 538 in the office of the county clerk in and for McIntosh County, State of Oklahoma, and a copy of which deed is hereto attached and made a *part* hereof and marked as "Exhibit F"; and that on said 17th day of September, 1921, the said Nora Marlin, *nee* Deer executed and delivered to this plaintiff her assignment of her claim for rents and profits arising from said real estate from the 17th day of September, 1916, to the 17th day of September, 1921; that by reason of said assignment this plaintiff is entitled to the rents and profits arising from said real estate during said time; that a copy of said assignment is hereto attached, made a part hereof and marked as "Exhibit G."

Plaintiff further alleges and states that he is entitled to the immediate possession of said real estate and that said defendant, John Lewallen, now unlawfully withholds the possession of said real estate from this plaintiff and has so unlawfully been in possession of said real estate for five years last past and that this plaintiff has been damaged in the sum of $1000.00 by said defendant, John Lewallen, withholding said possession.

Plaintiff further alleges and states: that the said

defendant, John Lewallen, has collected the rents and profits from the one-third interest in and to said real estate inherited by the said Nora Marlin and conveyed to this plaintiff, for the said five years last past and that said rents and profits from said interest amount to the sum of $1500.00 and that the rents and profits arising from the undivided one-third interest conveyed to this plaintiff by the said Lillie Nelson since the 14th day of December, 1920, amount to the sum of $500.00; that said defendant, John Lewallen has collected all of said rents and profits and converted same to his own use.

Wherefore, plaintiff prays that he have judgment against the defendant, John Lewallen, for the possession of said premises and for the said sum of $1000.00 as damages for withholding said possession and for $2000.00 for rents and profits, in all the sum of $3000.00 and for the costs of this action.

Second Cause of Action.

Plaintiff for his further and second cause of action refers to and repleads all of the allegations of his first cause of action and further alleges and states: that the said defendant, John Lewallen, is now collecting the rents and profits arising from said real estate and converting the same to his own use and benefit and that the said John Lewallen is insolvent and that irreparable injury will result to this plaintiff unless a receiver is appointed to collect the rents and profits arising from said real estate and the interest of this plaintiff therein and thereto.

Wherefore, plaintiff prays that this court apoint a receiver to collect the rents and profits arising from

said real estate and to hold the same subject to the order of this court.

Third Cause of Action.

The plaintiff for his further and third cause of action refers to and repleads all of the allegations in his first and second causes of action and further alleges and states: That the said plaintiff is the owner of an undivided two-thirds interest in and to said real estate and that the defendant, Lucy Condren, is the owner of an undivided one-third interest in and to said real estate and that no other person has an interest in or lien in or right to said premises; that the defendant, John Lewallen, claims some right, title or interest in and to said real estate the nature of which is unknown to this plaintiff, but that said claim is void and of no effect; and that said land is capable of being divided.

Wherefore, plaintiff prays for a partition of said property and that this court order and decree that the interest of plaintiff herein be an undivided two-thirds interest and that the interest of the defendant, Lucy Condren, be an undivided one-third interest and that the defendant, John Lewallen, be adjudged to have no right, title or valid claim in or to said property and that partition of said property be made accordingly and that the court appoint three commissioners to make partition of said respective shares and for such other order and relief as may be proper; that the costs, attorneys fees, and other expenses which may accrue in this action be apportioned among the parties according to their respective interest therein.

(Signed) Niles & Staley,

Attorneys for Plaintiff.

Thereafter, on the 30th day of March, 1922, the defendants, Lucy Condren, *nee* Lewallen, and John Lewallen, filed their joint answer to the petition of the plaintiff herein, which said answer so filed by said defendants, omitting the caption and exhibits is in words and figures as follows, to-wit:

Joint answer of Lucy Condren, nee Lewallen and John Lewallen to the petition of Plaintiff.

Comes now John Lewallen, leave of court being first obtained, and withdraws his answer heretofore filed herein; whereupon come the defendants, Lucy Condren, *nee* Lewallen, and John Lewallen, and for their joint answer to all of the petition of B. A. Marlin, plaintiff herein, alleges and states:

First Cause of Action.

They deny each, all and every material allegation in said first cause of action stated and contained, except as hereinafter specifically admitted, or otherwise plead.

(a) They admit that the lands in controversy, to-wit:

An undivided two-thirds (2-3rds) interest in and to the south half (S2) of the northeast (SE4) quarter; and the north half (N2) of the north half (N2) of the north half (N2) of the southeast (SE4) of section twenty-nine (29); and the south half (S2) of the south half (S2) of the southwest quarter (SW4) of section ten (10); and the east half (E2) of the northwest (NW4) quarter of the northwest quarter (NW4) of section fifteen (15); all in township eleven (11) north, range six'een (16) east, same being the al-

lotment of Louisa Lewallen, deceased, in the Creek Nation,

were allotted to one Louisa Lewallen; and that homestead and allotment deeds were thereafter duly issued therefor to her.

(b) That the said Louisa Lewallen died on the 29th day of November, 1904.

For a further defense to plaintiff's said first cause of action these answering defendants state that the said Louisa Lewallen was a citizen of the Muskogee, or Creek, tribe of Indians of the one-quarter blood, enrolled opposite number C-6231; and that on the 21st day of August, 1900, lawfully intermarried with the defendant herein, John Lewallen, a white man, and a non-citizen of the Creek Nation. That thereafter, and during the subsistence of the marriage relation between the said Louisa Lewallen and this answering defendant, John Lewallen, there was allotted to the said Louisa Lewallen by the Dawes Commission, out of the public domain of the Creek tribe of Indians, the land in controversy herein; and that thereafter on, to wit, the _____ day of _____, homestead and allotment patents were duly issued and delivered to her therefor by the principal chief of the Creek Nation, and duly approved by the Secretary of the Interior. That upon the allotment of said lands to the said Louisa Lewallen, as aforesaid, she and this answering defendant, John Lewallen, her husband, located their home upon said land, and both continued to reside upon said land until the death of the said Louisa Lewallen. That as a result of the marriage aforesaid of Louisa Lewallen and this answering defendant, John Lewallen, there was born three children, namely, Lucy Lewallen, now Lucy Condren, Lilly Lewallen, now Lilly Nelson, and Charlie Lewallen, all of whom sur-

vived the mother, and all of whom still survive, except the said Charlie Lewallen who died in infancy, intestate, unmarried and without issue on the 26th day of December, 1904. That all of said children were born while the said Louisa Lewallen and this answering defendant, John Lewallen, were living and residing as husband and wife upon the lands in controversy herein. That on the 29th day of November, 1904, and while the marriage relation between Louisa Lewallen and this answering defendant still subsisted said Louisa Lewallen departed this life, intestate, leaving surviving, her husband, John Lewallen, this answering defendant, Lucy Lewallen, now Lucy Condren, answering defendant herein, Lilly Lewallen, now Lilly Nelson, and Charlie Lewallen, all the issue of her marriage with this answering defendant, John Lewallen, and one Nora Deere, now Nora Marlin, a child by a former husband, all of whom still survive except the said Charlie Lewallen, who died as aforesaid on the 26th day of December, 1904.

That upon the death of the said Louisa Lewallen this answering defendant, John Lewallen, immediately entered into possession in his own right as tenant by the curtesy consummate, since which time he has been in the actual physical possession of said land, as such tenant, taking the rents and profits thereof.

That upon the birth of issue to the said Louisa Lewallen during the subsistence of the marriage relation with this answering defendant, John Lewallen, pursuant to the laws of the State of Arkansas, which were in force until November 16, 1907, he became a tenant by the curtesy initiate, and upon the death of his said wife aforesaid he became seized of a vested life estate in all of said land as tenant by the curtesy consummate, and en

titled to the possession of said land during the remainder of his natural life with a right to the rents and profits thereof. Hence these answering defendants deny that the defendant, John Lewallen, is now, or has ever been, in the unlawful possession of said lands; or that he now unlawfully withholds the possession thereof from the plaintiff; or that he has wrongfully collected and appropriated the rents thereof; or that the plaintiff has been damaged in the sum of three thousand ($3000.00) dollars, by defendant, John Lewallen, withholding said possession, and taking the rents and profits thereof.

Second Cause of Action.

Come now the defendants, and for their answer to plaintiff's second cause of action, reiterate all of the allegations contained in their answer herein to plaintiff's first cause of action in the same manner as if copied in words and figures, and further answering allege:

That as tenant by the curtesy this answering defendant, John Lewallen, is entitled to the rents and profits arising from the land in controversy for and during the remainder of his natural life in his own right, and the plaintiff is therefore not entitled to an accounting and a receiver to collect such rents and profits and hold the same subject to the order of the court; and hence, they deny that they are wrongfully appropriating such rents and profits, and deny that the plaintiff is entitled to an accounting and receiver.

Third Cause of Action.

Come now the defendants, and for their answer to the plaintiff's third cause of action, reiterate all matters set out in their answers

to said plaintiff's first and second causes of action, in like manner as if copied herein in words and figures, and:

Further answering state, that the defendant, John Lewallen, is a tenant by the curtesy in said land, and is entitled to the rents and profits of all of said land during the remainder of his natural life, and that plaintiff is, therefore, not entitled to a partition of said land; and, hence defendants deny that plaintiff is the owner of the undivided two-thirds interest in said land at the present time, and deny that he is entiled to a partition of said premises as claimed in said cause of action.

Wherefore, these defendants having fully answered pray judgment for their costs, and for such further relief as to the court may meet the requirements of justice.

That thereafter, to-wit: On the 30th day of March, 1922, the parties to this action filed their agreed statement of facts herein, which said agreed statement of facts so filed by the said parties, omitting the caption and exhibits, being in words and figures as follows, to-wit:

AGREED STATEMENT OF FACTS.

It is hereby stipulated by and between the parties to this cause, acting by and through their respective attorneys of record, that this cause shall be submitted to the court for final determination, and judgment, upon the following agreed statement of facts:

I.

The land in controversy was selected by and allotted to Louisa Lewallen, a citizen of the Creek

tribe of Indians of the one-fourth blood, enrolled opposite number C-6281, during her lifetime, and thereafter homestead and allotment patents or deeds were duly issued and delivered to her by the Principal Chief of the Creek Nation, and approved by the Secretary of the Interior; copies of which are hereto attached, marked Exhibits "A" and "B" respectively, and made parts of this agreed statement of facts.

That prior to selection and allotment of said land to her by the Dawes Commission, and on, to wit, the 21st day of August, 1900, the said Louisa Lewallen lawfully intermarried with the defendant herein, John Lewallen, a non-citizen of the Creek Nation, and a white man, not of Indian blood or descent.

(IV)

That upon the selection and allotment of said land to the said Louisa Lewallen, a residence was established upon said land by the defendant John Lewallen; and thereafter, both the said John Lewallen and Louisa Lewallen continued to reside upon said land and use the same as a home until the death of the said Louisa Lewallen.

(V)

That while the defendant John Lewallen was living and residing with his said wife, Louisa Lewallen, there was born to them in lawful wedlock three children, namely:

> Lucy Lewallen, now Lucy Condren; Lilly Lewallen, now Lilly Nelson; and Charlie Lewallen;

all of whom survived the mother, and all of whom still survive, except the said Charlie Lewallen,

who died in infancy, intestate, unmarried and without issue on the 26th day of December, 1904.

(VI)

That on the 29th day of November, 1904, and while the marriage relation between Louisa Lewallen and the defendant John Lewallen subsisted, the said Louisa Lewallen departed this life intestate, leaving surviving, her husband, John Lewallen, and Lucy Lewallen, now Lucy Condren, defendants herein; Lilly Lewallen, now Lilly Nelson, and Charlie Lewallen, all the issue of her marriage to the defendant, John Lewallen, and Nora Deere, now Nora Marlin, a child by a former husband, all of whom still survive except the said Charlie Lewallen, who died on the 26th day of December, 1904.

(VII)

That upon the death of the said Louisa Lewallen the defendant, John Lewallen, immediately entered in to possession of said land, since which time he has been in the actual physical possession of said land, taking the rents and profits thereof.

(VIII)

That Nora Deere, now Nora Marlin, is the wife of the plaintiff, B. A. Marlin, and that on the 17th day of September, 1921, the said Nora Marlin, *nee* Nora Deere, executed and delivered to the plaintiff, B. A. Marlin, her deed of that date conveying to the plaintiff her interest in and to the land in controversy herein, which deed is recorded in Book 36-D, at page 539, in the office of the county clerk in and for McIntosh County, Oklahoma, a copy of which deed is hereto attached, marked Exhibit "C", and made a part of this agreed statement of facts.

(IX)

That upon the 17th day of September, 1921, the said Nora Marlin, *nee* Deere, executed and delivered to the plaintiff her assignment of claim for rents and profits arising from her interest in said real estate from the 17th day of September, 1916, to the 17th day of September, 1921, a copy of which assignment is hereto attached, marked Exhibit "D", and made a part of this agreed statement of facts.

(X)

That Lilly Nelson, *nee* Lewallen, has sold and conveyed her interest in and to the land in controversy to the plaintiff, B. A. Marlin, as will more fully appear from copies of her deeds of conveyance attached hereto, marked Exhibits "E", "F" and "G", respectively, and made parts of this agreed statement of facts.

(XI)

It is further agreed that the reasonable rental value of the interest of Nora Marlin, *nee* Deere, in the real estate involved in this action from the period beginning five years prior to the institution of this action up to the present time, is $1000.00 dollars.

(XII)

It is further agreed that the reasonable rental value of the interest of Lilly Nelson, *nee* Lewallen, in the land involved in this action from the period beginning December 14, 1920, up to the present time is $150.00 dollars.

(XIII)

It is further agreed that the defendant, John

Lewallen, has, during the time he has been in possession of the property in controversy in this action, committed no injury or waste to said real estate on account of his possession and use thereof.

(XIV)

It is further stipulated and agreed between the parties that the defendant, John Lewallen, shall, for the crop year of 1922 and all subsequent years during the pendency of this action, and until the final determination thereof, deposit in the First National Bank of Checotah, Oklahoma, a sum equal to two-thirds of the usual and customary crop rental value of said premises, and that said monies, so deposited, shall remain on deposit in said bank subject to a final determination of this case, provided, however, that said John Lewallen shall have the right and privilege, if he so desires, of paying two-thirds of the taxes due on said premises out of said monies and shall furnish tax receipts for the amounts so expended; that the deposit of said money as aforesaid shall be in lieu of all claim for rents on said premises for the crop year of 1922 and subsequent years and until the final determination of this cause.

JOURNAL ENTRY.

Now on this 12th day of April, 1922, the same being a regular judicial day of the March term of the District Court within and for McIntosh County, State of Oklahoma, this cause comes on for hearing and trial; the plaintiff appearing in person and by his counsel, Niles & Staley, and the defendants appearing in person and by their counsel, Foster & Cameron, of Henryetta, Oklahoma, and Turner, Turner, Harley & Parris, of Eufaula, Oklahoma; thereupon the cause was submitted to

the court upon the pleadings, process and the agreed statement of facts heretofore filed on March 30th, 1922, in this cause. Thereupon said cause was argued to the court by counsel for plaintiff and defendants, and the court after hearing argument of counsel and examination of the pleadings, process and the agreed statement of facts, finds the issues in favor of the plaintiff and against the defendants, and that plaintiff is entitled to the immediate possession of said premises as tenant in common with the defendant Lucy Condren, and that the defendant, John Lewallen, has unlawfully detained possession of said premises from the plaintiff to his damage in the sum of $1,150.00 Dollars.

The court further finds that the plaintiff, B. A. Marlin, is the owner of an undivided two-thirds (2/3) interest, and the defendant, Lucy Condren, *nee* Lewallen, is the owner of an undivided one-third (1/3) interest in and to the real estate in controversy herein, to-wit:

> The south half of the northeast quarter and the north half of the north half of the north half of the southeast quarter of section twenty-nine (29); and the south half of the south half of the southwest quarter of section ten (10); and the east half of the northwest quarter of the northwest quarter of section fifteen, all in township eleven (11) north, range sixteen (16) east, being the allotment of Louisa Lewallen, deceased;

and that the defendant, John Lewallen, has no right, title or interest therein and that the plaintiff is entitled, as against the defendant, Lucy Condren, to a partition of said lands.

Wherefore, it is by the court *considered, ordered, adjudged and decreed*, that the plaintiff, B. A. Marlin, is the owner of an undivided two-

thirds interest in said land and is entitled to the immediate possession thereof as a co-tenant with the defendant, Lucy Condren; that the defendant, John Lewallen, is hereby declared to have no right, title or interest in and to said premises, or any part thereof, and that the plaintiff have and recover of and from the defendant, John Lewallen, the sum of $1150.00 as rents and profits received and collected by said defendant to this date.

It is further considered, ordered and adjudged, that the shares of the aforesaid parties, and their respective interests in the aforesaid lands, to-wit: an undivided two-thirds interest in the plaintiff, B. A. Marlin, and an undivided one-third interest in the defendant, Lucy Condren, be, and the same are hereby confirmed;

It is further adjudged and decreed, that partition of sale of lands be made accordingly; that ..... and ..... and ..... be, and are hereby appointed commissioners to make said partition and to report the same at the next term of this court, and that the attorney's fee of plaintiff's attorney herein be, and is hereby fixed at the sum of $750.00 Dollars, with the cost, attorney's fee and expenses of this sale be paid by the said B. A. Marlin and the said Lucy Condren, according to their respective interests.

To all of which action and ruling of the court in rendering judgment as aforesaid, the defendants, Lucy Condren, *nee* Lewallen, and each of them, at the time, duly object and except, and in open court give notice of their intention to appeal to the Supreme Court of the State of Oklahoma and ask that the court clerk of McIntosh County, State of Oklahoma, be instructed to note their intention to so appeal upon the proper records of this court, all of which is by the court granted and allowed, and thereupon, for good cause shown, said de-

fendants, Lucy Condren, *nee* Lewallen, and John Lewallen, are hereby granted an extension of time of sixty days from this date in which to prepare and serve a case-made herein upon the plaintiff, the plaintiff to have ten days thereafter in which to suggest amendments thereto, the same to be settled and signed upon five days written notice by either party.

It is further ordered, that the Supersedeas Bond herein be fixed at the sum of $2000.00, to be executed by the defendants and filed herein within twenty (20) days, and that execution herein be further stayed pending the determination of this cause in the Supreme Court of the State of Oklahoma, upon the filing and approval of the Supersedeas Bond as herein set forth.

MOTION FOR NEW TRIAL.

Come now the defendants, Lucy Condren, *nee* Lewallen and John Lewallen, and move the court to vacate, set aside and hold for naught the judgment and decision of the court rendered herein on the 12th day of April, 1922, and to grant a new trial herein for the following reasons and causes which materially affect the substantial rights of these defendants.

First. That the judgment and decision of the court is not sustained by sufficient evidence.

Second. That the judgment and decision of the court is contrary to the evidence.

Third. That the judgment and decision of the court is contrary to the law and the evidence.

Fourth. That the judgment and decision of the court is contrary to law.

Fifth. Error of law occurring at the trial

of said cause and duly excepted to by these defendants at the time.

Sixth. Error of the court in holding, as a matter of law, that the defendant, John Lewallen, was not entitled to a curtesy estate in and to the lands in controversy, to which ruling and judgment of the court, these defendants, at the time, duly objected and excepted.

ORDER OVERRULING MOTION FOR NEW TRIAL.

Now on this the 12th day of April, 1922, same being one of the judicial days of the adjourned March, 1922, term of the District Court within and for McIntosh County, State of Oklahoma, this cause comes on in regular order to be heard upon the motion of the defendants, Lucy Condren, *nee* Lewallen, and John Lewallen, for a new trial herein, and the plaintiff appearing in person and by his attorneys, Niles and Staley, and the defendants appearing in person and by their attorneys, Foster & Cameron, and Turner, Turner, Harley & Parris, and the court having considered said motion, and having heard and considered the argument of counsel and being well and sufficiently advised in the premises, finds:

That said motion for a new trial herein should be overruled.

It is therefore considered, ordered, adjudged and decreed by the court, that the motion for a new trial herein filed by the defendants, Lucy Condren, *nee* Lewallen and John Lewallen, be, and the same is hereby, in all things, overruled. To all of which action and ruling of the court in overruling their motion for a new trial the defendants, Lucy Condren, *nee* Lewallen, and John

Lewallen, and each of them, at the time, duly object and except, and in open court give notice of their intention to appeal to the Supreme Court of the State of Oklahoma, and ask that the court clerk of McIntosh County, State of Oklahoma, be instructed to note their intention to so appeal upon the proper records of this court, all of which is by the court granted and allowed, and thereupon for good cause shown, the defendants, Lucy Condren, *nee* Lewallen, and John Lewallen, are hereby granted an extension of time of sixty days from this date in which to prepare and serve a case-made herein upon the plaintiff, the plaintiff to have ten days thereafter in which to suggest amendments thereto and same to be settled and signed upon five days' written notice by either party.

It is further ordered, that the supersedeas bond herein be fixed at the sum of $2000.00 to be executed by the defendants and filed herein within twenty days from this date, and that execution be stayed pending the filing and approval of said bond within said twenty days, and that execution herein be further stayed pending the determination of this cause in the Supreme Court of the State of Oklahoma upon the filing and approval of the supersereas bond as herein set forth.

That thereafter, on September 8, 1922, the plaintiffs in error filed in the Supreme Court of the State of Oklahoma, their petition in error, in words and figures as follows:

"IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Lucy Condren nee Lewallen and John Lewallen,
Plaintiffs in Error,

vs.

B. A. Marlin, Defendant in Error.

No. 13740

PETITION IN ERROR

The said Lucy Condren nee Lewallen and John Lewallen, plaintiffs in error, complains of said Defendant in Error, for that the said B. A. Marlin, at the March 1922 Term of the District Court in and for McIntosh County, Oklahoma, recovered a judgment by the consideration of said Court against the said Lucy Condren nee Lewallen and John Lewallen in a certain action then pending in said court wherein the said B. A. Marlin was plaintiff and the said Lucy Condren nee Lewallen and John Lewallen were defendants. A certified transcript of the record of the Court and the original case-made, duly certified and attested, is hereunto attached, marked Exhibit "A" and made a part of this petition in error, and that said plaintiffs in error aver that there is error in said record and proceedings, in this, towit:

I.

That said Court erred in overruling the Motion of Plaintiffs in Error for a new trial.

II.

That the judgment and decision of said Court is contrary to the evidence.

III.

That the judgment and decision of the court is contrary to the law and the evidence.

IV.

That the judgment and decision of the court is contrary to law.

V.

Error of law occurring at the trial of said cause and duly excepted to by these plaintiffs in error at the time thereof.

VI.

That the said court erred in holding as a matter of law that the plaintiff in error, John Lewallen, was not entitled to a curtesy estate in and to the lands in controversy, to which ruling and judgment of the court these plaintiffs in error at the time duly objected and excepted.

WHEREFORE, plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiffs in error and against the defendant in error, and that the plaintiffs in error be restored to all rights that they have lost by the rendition of such judgment, and for such other relief as to the court may seem just.

Lucy Condren nee Lewallen,
John Lewallen,
Plaintiffs in Error.

By Foster & Cameron and Turner,
Turner, Harley & Parris,
Their Attorneys."

That thereafter, on May 12, 1925, the court handed down its opinion as follows:

CONDREN et al. v. MARLIN.

No. 13740—Opinion Filed May 12, 1925.

(Syllabus.)

Indians—Curtesy—Rights of Surviving White Husband in Creek Wife's Allotment.

Act of Congress May 2, 1890, put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, except as to Indians and their estates. Act of Congress July 7, 1897, extended the law to all persons in the Indian Territory, irrespective of race, and title by curtesy consummate as it existed in the state of Arkansas attaches in favor of the husband to the lands of which his wife died seised; and that part of section 6 of the Act of Congress of June 30, 1902 (32 Stat. at L. 500), reading: "Provided that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation," does not prohibit a white man, who is a noncitizen of the Creek Nation, from asserting his curtesy right to the lands of his deceased wife, who was a Creek citizen, where they lived upon the land, had children born alive to them and the wife died seised during coverture.

Error from District Court, McIntosh County; Harve L. Melton, Judge.

Action by B. A. Marlin against Lucy Condren, nee Lewallen, and John Lewallen, for possession of land, partition, and damages. Judgment for plaintiff, and defendants appeal. Reversed.

Turner, Turner, Harley & Parris, for plaintiffs in error.

Claude A. Niles, for defendant in error.

PHELPS, J. Louisa Lewallen was a citizen of the Creek Tribe of Indians of the one-fourth blood. On August 21, 1900, she and John Lewallen were duly married. John Lewallen was a white man, a noncitizen of the Creek Nation not of Indian blood or descent. After the marriage of Louisa Lewallen and John Lewallen, the land which is the subject-matter of this action was duly selected by and allotted to said Louisa Lewallen and allotment patents or deeds were issued, approved, and delivered, after which said Louisa Lewallen and John Lewallen, while living together as husband and wife, moved upon said land and occupied it as their home until the death of said Louisa Lewallen on November 29, 1904, and the same has been continuously occupied by John Lewallen as his home since the death of his said wife.

At the death of said Louisa Lewallen she left surviving, her husband, John Lewallen, and three minor children, Lucy, Lillie, and Charlie Lewallen, all the lawful issue of the marriage between Louisa Lewallen and John Lewallen, and also Nora Deer, who is now Nora Marlin, a child by a former husband. On the 26th day of December, 1904, after the death of Louisa Lewallen, her son Charlie Lewallen, then a small boy, also died. Lucy and Lillie grew to womanhood and married, and are referred to in the record herein as Lucy Condren and Lillie Nelson. Nora Marlin and Lillie Nelson, daughters of decedent, sold and conveyed their interest in the lands in opposition—the allotment of Louisa Lewallen, deceased—to B. A. Marlin, and on September 26, 1921, said B. A. Marlin filed his action in the district court of

McIntosh county, Okla., against Lucy Condren and John Lewallen, alleging that he was the owner in fee of an undivided two-thirds interest in the lands in question, and that Lucy Condren was the owner of the other undivided one-third interest therein; that John Lewallen had no interest in the land, but had occupied it for a number of years, and prayed judgment for possession of the premises, for damages, rents, and profits, and also for partition of the real estate. Defendants filed their answer pleading the facts relative to the allotment, marriage, birth of the children, occupancy of the premises as a homestead, etc., and that upon the death of said Louisa Lewallen the defendant John Lewallen immediately entered into possession in his own right as tenant by the curtesy consummate, and has been in actual physical possession of said land as such tenant taking the rents and profits thereof ever since said date, and further alleging that upon the birth of issue to said Louisa Lewallen during the subsistence of the marriage relation with said John Lewallen, pursuant to the laws of the state of Arkansas, which were in full force until November 16, 1907, he became a tenant by the curtesy initiate, and upon the death of his wife he became seised of a vested life estate in all of said land as tenant by the curtesy consummate, and entitled to the possession of said land during the remainder of his natural life, with the right to the rents and profits thereof.

The case was tried upon an agreed statement without a single disputed question of fact, and on the 12th day of April, 1922, the district court of McIntosh county rendered judgment finding plaintiff entitled to the immediate possession of said premises as a tenant in common with defendant Lucy Condren, and further finding that plaintiff, B. A. Marlin, was the owner of an undivided

two-thirds interest and Lucy Condren was the owner of an undivided one-third interest in the land, and that John Lewallen had no interest therein and had unlawfully detained possession of the premises, and rendered judgment against him for the sum of $1,150 as rents and profits received and collected by him, and also rendered judgment in partition, from which judgment and the court's order overruling their motion for a new trial defendants prosecute this appeal.

There are two questions presented for our determination by the record in this case, the first of which is: Under the law in force on November 29, 1904, the date of the death of Louisa Lewallen, was there any provision for an estate by the curtesy in the Creek Nation? This must be answered in the affirmative. In Kenoly et al. v. Hawley, 84 Okla. 120, 202 Pac. 494, this court had under consideration a cause the facts out of which the same grew being that on the 3rd day of July, 1902, Mary Adams, a Creek freedman citizen of the Creek Nation, died intestate, and left surviving her as her sole heirs her husband, Ben Adams, and her three minor children, all of tender years. Upon the death of Mary Adams the title to the property in controversy descended to her three children under and by virtue of chapter 49 of Mansfield's Digest of the Laws of Arkansas, which had been put into effect in the Indian Territory by an Act of Congress of July 1, 1902, c. 1323, 32 Stat. 501. Ben Adams, the husband of deceased and father of her minor children, claimed an estate by curtesy in his deceased wife's estate by virtue of chapter 20 of Mansfield's Digest of the Laws of Arkansas, put in force in the Indian Territory by Act of Congress of May 2, 1890, c. 182, 26 Stat. 94, and this court, commenting on his claim in the body of the opinion, made use of the following language:

"The final question to be considered is the question of curtesy of Ben Adams in the estate of his deceased wife, Mary Adams. The wife died seised and with issue born alive, and if the right of curtesy existed under the law in force her estate was subject thereto. In the case of Johnson et al. v. Simpson, 40 Okla. 413, 139 Pac. 129, Mr. Justice Kane, speaking for the court, said: 'Upon the passage and approval of Act May 2, 1890, c. 182, 26 St. at L. 94, which extended over and put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, with the proviso excepting Indians and their estates, and Act June 7, 1897, c. 3, 30 St. at L. 83, which provided that such laws should apply to all persons of Indian Territory, irrespective of race, and the Curtis Act of June 28, 1898, c. 517, 30 St. at L. 495, which provided that the laws of Indian Tribes should no longer be enforced, title by curtesy consummate, as it existed in the state of Arkansas, attached in favor of the husband to all lands of which the wife became seised during coverture.'

"This case has been followed, and the doctrine announced therein reaffirmed, in the cases of Pierce et al. v. Ellis et al., 51 Okla. 710, 152 Pac. 340; Morris v. Sweeney, 53 Okla. 163, 155 Pac. 537; Bridges v. Wright, 56 Okla. 10, 155 Pac. 883; Miles v. Miles, 73 Okla. 198, 175 Pac. 222. It follows that the right of curtesy of the husband, Ben Adams, under the Arkansas statute then in force, must be sustained."

And the eighth paragraph of the syllabus is as follows:

"Act Cong. May 2, 1890, put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, except as to Indians and their estates. Act Cong. June 7,

1897, extended the law to all persons in the Indian Territory, irrespective of race, and title by curtesy consummate, as it existed in the state of Arkansas, attaches in favor of the husband to all lands of which his wife died seised."

Therefore it appears to be well settled that at the time of the death of decedent the laws of this state recognized an estate by the curtesy in the Creek Nation, and the other and remaining question for us to determine is: Is such an estate one that is embraced within the terms of the first proviso to section 6 of the Supplemental Creek agreement, which provides:

"That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation."

Hopkins on Real Property, page 73, sec. 43, says:

"By common law a husband is entitled to curtesy, which is an estate for the life of the husband in all the wife's realty, provided the following conditions concur: (a) Valid marriage; (b) issue born alive and capable of inheriting; (c) seisin in deed of the wife during coverture; (d) death of wife before husband."

From the facts as disclosed by the record in this case there is no question but that John Lewallen was entitled to an estate by the curtesy consummate, unless because of his being a noncitizen of the Creek Nation and not of Indian blood or descent he was deprived thereof by the proviso to section 6 of the Act of Congress of June 30, 1902 (32 Stat. at L. 500), which seems to have been the basis of the opinion of the trial court.

That part of section 6 applicable reads as follows:

"* * * The provisions of the Act of Congress approved March 1, 1901 (31 Stat. at L. 84), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; *Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation.* * * *"

In ascertaining whether the term "inherit," as used above, is broad enough to include the common-law right of curtesy, it is interesting and possibly illuminating to consider the meaning of the word "inherit." It is defined in Black's Law Dictionary as meaning "to take by inheritance; to take as heir on the death of the ancestor." By Webster as meaning "to take by descent from an ancestor; to take or receive, as a right or title, by law from an ancestor at his decease." And in Re Byford's Will, 65 Okla. 159, 165 Pac. 194, in the fifth paragraph of the syllabus, this court said:

"* * * The word 'inherit' is synonymous with the word 'descend' as used in the original agreement with the Creek Nation approved by the Act of Congress March 1, 1901. * * *"

Therefore, the real question in this case is: Does the estate by the curtesy vest in the husband by descent, or is it an estate acquired by virtue of the marriage relation?

Tiffany, Real Property (2nd Ed.) sec. 237, states the rule as follows:

"The common-law estate by the curtesy, commencing as it did before the death of the wife, can evidently not be regarded as having vested in the husband by *descent* from her, although he acquired it by operation of law and not by assignment. The modern curtesy, as it exists since the abolition of curtesy initiate, with merely a possibility of an estate in the husband until the wife's death, when an estate becomes vested in the husband, although it does so by operation of law, has been regarded as not vesting in him by descent or succession for the purpose of the inheritance tax. Such a view accords with the analogy presented by the case of lower, and with the common-law view of the curtesy, which, as above indicated, could not be regarded as taking effect by way of descent."

Thompson on Real Property, page 884, sec. 780, says:

"By vesting during the lifetime of the wife an estate by the curtesy is not one acquired by descent. The husband's right of curtesy is not acquired by him by reason of intestate laws, but is a common-law right which during the lifetime of his wife was initiate, but which after her death became consummate, and his right to the same could not be questioned from the time that his wife was seised of the property and their child or children were born alive, unless, under the married woman's acts, she disposed of the same by deed or will."

Corpus Juris, vol. 17, page 415, has this to say:

"• • • But whatever lack of judicial harmony may exist in characterizing an estate by the curtesy, it is clearly a common-law right which, although partaking somewhat of title by descent,

is an estate which is cast upon the tenant by operation of law. * * *"

In Armstrong v. Wood, 195 Fed. 137, the court had under consideration, among other questions, the question of curtesy, the facts being that Annie McMinn, a full-blood citizen of the Creek Nation, was married to Allen J. Wilson, a noncitizen of the Creek Nation. They moved upon the land in question, a child was born alive to them, and the wife died before patents were issued for the land. The court upheld the husband's curtesy right, and in the third paragraph of the syllabus used the following language:

"By Act May 2, 1890, c. 182, sec. 31, 26 Stat. 94, sections 566, 567, Mansf. Dig. (sections 465q, 465r, Ind. T. Ann. St. 1899), was extended over Indian Territory with a proviso excepting Indians and their estates. By act June 7, 1897, c. 3, sec. 1, 30 Stat. 83, such laws were made to apply to all persons in the territory 'irrespective of race,' and by the Curtis Act, June 28, 1898, c. 517, sec. 26, 30 Stat. 504, it was provided that the laws of the Indian tribes should no longer be enforced. *Held*, that, by virtue of such provisions, a noncitizen husband of a Creek allottee who died after the birth of a child of the marriage was entitled by the curtesy to a life estate in her allotted lands."

Counsel for defendant in error, with some justification, criticizes this opinion and states in his brief that it has ceased to be regarded as an authority, for the reason that Judge Campbell, who wrote the opinion, based his conclusion on an entirely erroneous conception of the law when he said in the opinion:

"It is my opinion that the proviso only applies to the distribution of those several portions

of the tribal lands among the heirs of each of such members of the tribe as died prior to allotment, who, had they been living at the time of allotment, would have been entitled to the land. * * * It follows that as Annie McMinn, the original allottee involved in the case, took her allotment during her lifetime, the inhibition as to noncitizen heirs expressed in section 6 does not apply to her lands."

And in Woodward v. DeGraffenried, 238 U. S. 284, 35 Sup. Ct. Rep. 764, Mr. Justice Pitney said:

"* * * The reasoning of Judge Campbell savors too much of refinement to be accepted as the true theory."

However, it will be observed that the criticism of Mr. Justice Pitney was not directed to the rule laid down by Judge Campbell relative to the husband's curtesy right, but as to the class of tribal lands to which the proviso applied.

Counsel for defendant in error also contends that Pierce v. Ellis, 51 Okla. 710, 152 Pac. 340, should not be considered an authority in this case, for the reason that Judge Brewer (Commissioner), who wrote the opinion of this court, based the opinion upon the rule announced in Armstrong v. Wood (supra), and also for the reason that that involved a Chickasaw allotment, and while Justice Pitney's criticism of the opinion in Armstrong v. Wood and the fact that in Pierce v. Ellis a Chickasaw allotment instead of a Creek allotment was the subject-matter of the litigation, may detract somewhat from the potency of this opinion as authority in the case at bar, the law announced in the first paragraph of the syllabus, in our judgment, stated the correct theory, as follows:

"Upon the passage and approval of Act May 2, 1890, c. 182, 26 St. at L. 94, which extended

over and put in force in the Indian Territory the common law of England as adopted by the state of Arkansas, with the proviso excepting Indians and their estates, and Act June 7, 1897, c. 3, sec. 1, 30 St. at L. 83, which provided that such laws should apply to all persons of the Indian Territory, irrespective of race, and Curtis Act June 28, 1898, c. 517, 30 St. at L. 495, which provided that the laws of Indian tribes should no longer be enforced, title by curtesy consummate, as it existed in the state of Arkansas, attached in favor of the husband to all lands of which the wife became seised during the coverture."

Therefore, after a careful examination of the authorities cited in the briefs, together with other available authorities, it is our conclusion that, as applied to the facts in this case, the estate by the curtesy does not vest in the husband by descent, but is an estate acquired by virtue of the marriage relation, and, therefore, the first proviso of section 6 of the Act of Cong. of June 30, 1902, and reading as follows:

"*Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation.*"

—does not abrogate or abridge the husband's right of curtesy to the lands allotted to his wife, she being a citizen of the Creek Nation and the husband being a white man and noncitizen. The judgment of the district court of McIntosh county is therefore reversed.

Mason, Lester, Hunt, and Riley, JJ., concur. Nicholson, C. J., Branson, V. C. J., and Clark, J., dissent.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full true and complete copy of the opinion of said Court in the above entitled cause, as the same remains on file in my office.

In Witness whereof, I hereunto set my hand and affix the Seal of said Court at Oklahoma City this 9 day of December, 1925.

[SEAL.] WM. M. FRANKLIN,
Clerk.

Endorsed: Filed, Dec. 9, 1925. B. F. Venator Court Clerk, McIntosh County, Oklahoma.

STATE OF OKLAHOMA,
County of McIntosh, ss:

I, B. F. Venator, Court Clerk within and for the County of McIntosh, State of Oklahoma, hereby certify that the above and foregoing is a true and correct copy of the Mandate and Opinion of Supreme Court of the State of Oklahoma in this matter, as the same appears of record in my office.

In Witness Whereof I hereunto set my hand and affix my official seal at Eufaula, Oklahoma this 30 day of Mar., 1926.

[Seal Court Clerk, McIntosh County, Oklahoma.]

By B. F. VENATOR,
Deputy Court Clerk.

STATE OF OKLAHOMA, ss:

SUPREME COURT

D. C. #3088, No. 13740

LUCY CONDREN, nee LEWALLEN, and JOHN LEWALLEN,
Plaintiff in Error,

vs.

B. A. MARLIN, Defendant in Error.

MANDATE

The Supreme Court of Oklahoma to the Honorable Judge of the District Court of McIntosh County, in said State of Oklahoma:

Whereas, the Supreme Court of the State of Oklahoma, did on the 12th day of May, 1925 render an opinion in the above entitled cause, appealed from the District Court of McIntosh County.

Reversing the judgment of the trial court;

Now therefore, you are hereby commanded to cause such reversal to show of record in your court and to issue such process and to take such other and further action as may be in accord with right and justice and said opinion.

Affidavit of cost of case-made	$
Costs in the Supreme Court	24 50

Witness the Honorable Geo. M. Nicholson, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma, this 9th day of December, 1925.

[SEAL.] WM. M. FRANKLIN,
Clerk.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the fore

going annexed pages are a true copy of the Petition, Joint Answer of Lucy Condren, nee Lewallen, and John Lewallen to the petition of plaintiff, Agreed Statement of Facts, Journal Entry, Motion for New Trial, Order overruling Motion for New Trial, Petition in error, and opinion of the Supreme Court in cause No. 13,740, Lucy Condren, nee Lewallen, and John Lewallen, Plaintiffs in error, versus B. A. Marlin, Defendant in error, as the same appear in the case made on file in my office.

I further certify that the petition for rehearing was overruled on December 1, 1925, as the same appears of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 19th day of March, 1926.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court, Oklahoma,
By JESSIE PARDOE,
Deputy.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI—Filed March 1, 1926

Now on this first day of March, A. D., 1926, the defendant in error, B. A. Marlin, for good cause shown is granted an extension of time within which to file an application for a writ of certiorari in the above entitled cause, to and including March 22, 1926.

WILLIS VAN DEVANTER,
Associate Justice, U. S. Supreme Court.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI—Filed March 22, 1926

For good cause shown the time for filing an application for a writ of certiorari to review the final judgment of the Supreme Court of the State of Oklahoma in the above entitled cause, is hereby extended to an-including March 25, 1926.

WILLIS VAN DEVANTER,
Associate Justice.

Dated March 22, 1926.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI—Filed March 25, 1926

For good cause shown the time for filing an application for a writ of certiorari to review the final judgment of the Supreme Court of the State of Oklahoma in the above entitled cause, is hereby extended to an-including April 5, 1926.

WILLIS VAN DEVANTER,
Associate Justice.

Dated March 25, 1926.

BRIEF

The question involved in this cause is the right of a non-citizen husband to an estate by the curtesy in the allotment of his Creek wife, who died on November 29th, 1904. We shall argue the matter under two headings, as it naturally resolves itself into two questions, as follows:

I.

Under the law in force on November 29th, 1904, was there any provision for an estate by the curtesy in the Creek Nation?

II.

If so, is such an estate one that is embraced within the terms of the first proviso to section 6 of the Supplemental Creek Agreement, which provides "that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation"?

We agree that chapter 20 of Mansfield's Digest of the Laws of Arkansas, which provided for an estate by the curtesy, was put in force in the Indian Territory by the Act of Congress of June 7th, 1897, and that the estate did not exist in the Indian Territory by reason of Chapter 49 of said Mansfield's Digest; which had been put in force in the Indian Territory. It is also true that in so far as the Creek Nation was concerned all of the laws of Arkansas which relate to descent or succession of Creek lands and which had been previously put in force in the Indian Territory were repealed by the Act of March 1st, 1901, known as the Original Creek Agreement.

Woodward v. *deGraffenried*, 238 U. S. 284, 35 Supreme Court Reporter 764.

The Act of May 27, 1902, repealed the provisions of the 1901 Act in so far as said act provided for descent and distribution according to the laws of the Creek Nation and provided that the descent of said lands should be according to Chapter 49, but does not re-enact Chapter 20, which had been repealed. Section 6 of the Creek Supplemental Agreement refers only to Chapter 49. The Act of Congress of April 28th, 1904, provided that the laws of Arkansas were *continued* and *extended* in their operation in the Indian Territory. We think that the language clearly indicates an intention to continue and extend in their operation only such laws as were in force at the time and not to resurrect and re-enact any laws which had theretofore been repealed. The general laws applicable to the entire Indian Territory would not prevail over the special enactments applicable to the Creek Nation alone.

We realize that the Supreme Court of Oklahoma has, in the comparatively recent case of *Kenoly* v. *Hawley*, 84 Okla. 120, 202 Pac. 494, decided this particular point adversely to the above contention, but in this case the court does not seem to have taken into consideration the repeal of the earlier acts, by the 1901 Act, insofar as curtesy in the Creek Nation was concerned, and that nowhere is this provision re-enacted.

If the court adheres to the view expressed in *Kenoly* v. *Hawley*, *supra*, it leaves nothing but the second question stated above, namely, is an estate by the curtesy one that comes within the scope of the

first proviso to Section 6 of the Supplemental Creek Agreement, quoted above?

If we will take into consideration the history of the congressional legislation relative to the affairs of the Creek Nation and consider the provisions of the original and supplemental agreements, this question should not be difficult to answer. The Act of March 1st, 1901, known as the Original Creek Agreement, provides, in regard to the descent of the allotments of the Creeks as follows:

> "* * * the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The House of Kings and the House of Warriors, which composed the Creek Legislature, had passed a law, rather primitive in its nature, providing for the distribution of the personal property of an intestate Creek, but during the time their tribal government functioned they had no real estate to descend. This situation was certain to prove troublesome, and the representatives of the United States Government desired that this law of descent be changed, but the Creek Commissioners, as might be expected, opposed the change. In the case of *Woodward* v. *deGraffenried*, *supra*, MR. JUSTICE PITNEY, in speaking of the 1901 Act, said:

> "The adoption of the Creek law of descent was a concession to the Indians, who were, of course, more familiar with their own laws than with Chapter 49 of Mansfield's Digest, and were no doubt materially influenced in giving consent

to the treaty by the fact that thereafter their lands would descend just as their personal property had descended in former times."

Finally, however, the matter was adjusted and compromised by the insertion of the first proviso to Section 6 of the proposed agreement and the Creeks "were no doubt materially influenced in giving their consent" to this supplemental agreement or treaty by the fact that this proviso was inserted. It is logical to contend that the Congress and the Creek Commissioners, by this proviso, sought to protect the rights of the Creek Indians to inherit Creek lands to the exclusion of all others, and that above all they sought to exclude the non-citizen man who married a Creek woman—"the squaw man"—whose motives were usually the most mercenary. The plaintiff in error, John Lewallen, is the only person interested in having this cause affirmed because the decision of the trial court was favorable to the plaintiff in error, Lucy Condren, as it was held that she inherited an undivided one-third interest in her mother's allotment free from any claim of curtesy by Lewallen. Defendant in error is the husband of another daughter of the allottee.

While it is conceded that the first proviso of Section 6 was in full force and effect at the time of the death of the allottee, it was contended by opposing counsel that an estate by the curtesy is not an estate of inheritance and for that reason that it does not come within the terms of the proviso. In a very strict and technical sense an estate by the curtesy is perhaps not an estate of inheritance, but the plain intent of Congress, the Commission to the Five Civilized Tribes (which represented the United States in the negotia-

tions with the Creeks) and the Creek Comissioners was to preserve the inheritance of Creek property intact to the Creek heirs and to the exclusion of non-citizens, and that non-citizen heirs should take only after a complete failure of Creek heirs as provided in the second proviso.

It would be very illogical to say that a non-citizen husband could not inherit an interest in the land of his Creek wife and then permit him to carve out an estate in the land which would be more valuable, than the one he would take under the law of descent, for instance, of the State of Oklahoma. In other words, it is not an estate of inheritance, it is such a curtailment of the inheritance that the law would not allow it. In fact, the carving out of the life estate would, in most instances, deprive the inheritance of practically its whole value in the hands of the Creek heirs. A full-blood Creek Indian who heard the argument in the trial court, we think, very appropriately illustrated the situation. He remarked that to say that under the law the Creek heirs could not be deprived of their inheritance in the lands of their Creek mother in any manner, and then to allow the non-citizen husband to have a life estate, which destroyed the value of their inheritance, was equivalent to saying "that you may lawfully cut off a man's head but you must not kill him."

The good faith which should characterize the dealing of the United States of America with the Indian tribes demands that this proviso be fairly interpreted with the view of carrying out the intent of the parties to the agreement and to adopt the extremely technical construction urged by opposing counsel be-

low would be far from acting in good faith toward persons, who at the time of the making of the agreement were hepless wards of the government. In the case of *Woodward* v. *deGraffenried, supra*, Mr. Justice Pitney, in commenting on the proper rule of construction to be applied in matters of this kind, said:

> "Even if this construction accorded with the strict letter of the agreement, it savors too much of refinement to be accepted as an exposition of the true intent and meaning of an engagement made between the government of the United States and an Indian Tribe."

The same rule was announced early in the history of the United States by Chief Justice Marshall, in the case of *Worcester* v. *The State of Georgia*, 6 Peters 582, 8 L. ed. 508. Mr. Justice McLean, in concurring with the decision rendered by Chief Justice Marshall, uses this language:

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense."

Under this rule it is plain that the word "inherit" in the first proviso to section 6 contemplates the husband claiming an estate by the curtesy.

In *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, Mr. Justice Gray, in speaking of a treaty with an Indian tribe said:

> " * * * and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the

sense in which they would naturally be understood by the Indians."

In the case of *Choate* v. *Trapp*, 224 U. S. 667, 56 L. ed. 946, MR. JUSTICE LAMAR uses these words:

> "But in the government's dealings with the Indians the rule is exactly the contrary. The construction instead of being strict, is liberal; doubtful expressions instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years."

In the case of *Kenoly* v. *Hauley*, *supra*, it will be noted that the wife died on July 3rd, 1902, which was before the Creek Supplemental Agreement became effective on August 8th, 1902, and therefore this case will not assist us in arriving at a solution of the second question. It is not disclosed in the decision whether the husband was a citizen of the Creek Nation or not but this is immaterial for the reason that the proviso limiting the inheritance to the Creek heirs had not yet become effective and the court proceeded upon the theory that the Act of May 27, 1902, had re-enacted Chapter 20 of Mansfield's Digest. As stated above, we think that this was erroneous for the reason that the said Act of May 27th, 1902, referred only to Chapter 49.

The case of *Pierce* v. *Ellis*, 51 Okla. 710, 152 Pac. 340, which was cited by opposing counsel, involves a Chickasaw allotment. JUDGE BREWER, who wrote the opinion, followed *Armstrong* v. *Wood*, 195 Fed. 137. *Armstrong* v. *Wood* has long since ceased to be re-

garded as an authority for the reason that, in the light of more mature research, JUDGE CAMPBELL based his conclusion on an entirely erroneous conception of the law applicable to the first proviso to section 6. In this connection he said:

> "It is my opinion that the proviso only applies to the distribution of those several portions of the tribal lands among the heirs of each of such members of the tribe as died prior to allotment, who, had they been living at the time of allotment, would have been entitled to the land. * * * It follows that as Annie McMinn, the original allottee involved in this case, took her allotment during her lifetime, the inhibition as to non-citizen heirs expressed in section 6, does not apply to her lands."

Upon this theory it was held that the non-citizen husband was entitled to a curtesy right in the allotment of his Creek wife. This theory is manifestly erroneous as it has been finally and definitely settled that while the proviso was in force it applied to allotments received during the lifetime of the allottee. However, the inference is plain that in cases where the proviso applied, the claim of an estate by the curtesy by a non-citizen husband came within the inhibition as to non-citizen heirs. In the language of MR. JUSTICE PITNEY, in *Woodward* v. *deGraffenried*, *supra*, the reasoning of JUDGE CAMPBELL savors too much of refinement to be accepted as the true theory.

In the case of *Pierce* v. *Ellis*, *supra*, JUDGE BREWER seemed to be doubtful as to whether the rule announced should apply to a Creek allotment and said:

> "In fact it would appear that more reasons could be given to take the Creek lands out of the

rule, than to take the Chickasaw and Choctaw lands out of it."

In their brief, in the Supreme Court of Oklahoma counsel for plaintiffs in error say: "The proviso with reference to non-citizens in the Supplemental Creek Agreement by its own terms, limits its operation to lands which descend and are inherited under the provisions of Chapter 49 of Mansfield's Digest." It seems very clear to us that the descent, and every phase thereof, of *all lands*, owned by the allottee at the time of his death, during the time it was in force, was provided for by section 6, which contained this proviso, and that all such lands descended according to Chapter 49. Section 6 in connection with Chapter 49, which it adopts, is complete in itself, and in determining the disposition of an allotment of a Creek Indian who died intestate while it was in force, a reference to any other act or law is neither necessary nor proper.

The case of *Campbell* v. *Wadsworth*, 248 U. S. 169, 63 L. ed. 192, involved the rights of a widow and two daughters, all enrolled as Creeks, to inherit the allotment of a Seminole Indian. For the purposes of this argument, the provisions of the Seminole Agreement may be regarded as identical with the first proviso of section 6 of the Supplemental Creek Agreement, as the Seminole Agreement provided that the land shall descend to heirs who are Seminole citizens. The Supreme Court of Oklahoma held that the two daughters inherited the land subject to the dower estate of the widow. The Supreme Court of the United States rather pointedly reversed the Supreme Court of Oklahoma, and stated the correct rule to be that expressed in a former decision of the Supreme Court of Okla-

homa, which had been withdrawn, and in which it was held that the non-citizen widow was not entitled to dower and that the land was inherited by the collateral kindred of the deceased Seminole who were Seminole citizens. The analogy between the case at bar and the *Campbell-Wadsworth* case is complete and perfect and we respectfully urge that the said case is decisive of the case at bar and controlling herein. While the dower right is not discussed at any great length in the *Campbell* case, it is clear that the Creek widow was entirely excluded from any interest in the real estate. Mr. Justice Clarke in this decision stated:

> "The rights of the Creek mother cannot rise higher than those of her daughters."

Inasmuch as it was held that the Creek daughters took nothing, this was tantamout to saying that the mother took no estate in the allotment of her Seminole husband.

In the case of *Scott* v. *Ryal*, 78 Okla. 12, 186 Pac. 206, Mr. Justice Kane, who wrote the opinion, took this same view of the *Campbell-Wadsworth* case. *Scott* v. *Ryal* involved a claim by a non-citizen to a homestead right in the allotment of his deceased Creek wife. While this case has been overruled by *In re Pigeon's Estate*, 198 Pac. 309, insofar as it involves the descent of a Creek allotment since statehood, we regard it as controlling in a case which arose while section 6 of the Supplemental Agreement was conceded to be in force. This case contains the following language:

> "* * * and that it is now definitely settled that a non-citizen husband of a citizen wife, neither as heir, nor by virtue of the marital relation,

has any right, either by homestead or otherwise, in the lands of the Creek Nation, as against citizen heirs. While the *Campbell* case, *supra*, is not precisely in point, we believe that by analogy it sustains this view of the law."

"In our judgment the precise nature of the right is not material."

"In our judgment, to concede this substantial right (homestead) to the defendant would be subversive of the well known purpose of Congress in passing Section 6 of the Supplemental Agreement, protecting the rights of citizens of the Creek Nation to inherit the lands thereof, to the exclusion of the non-citizen heirs."

In *Zimmerman* v. *Holmes*, 59 Okla. 253, 159 Pac. 303, it was held that under the provision of the Act of April 26th, 1906, which required the approval of conveyances from "heirs who are full-blood Indians" by the Secretary of the Interior, a conveyance of the curtesy estate by a full-blood Choctaw Indian required such approval. In this case the word heirs is held to include a husband taking an estate by the curtesy. The court said, in effect, that to hold otherwise would be contrary to the settled policy of the United States in legislating for the protection of the Indians. The fact that in the *Zimmerman* case the husband was a full-blood Indian would have nothing to do with the effect of the reasoning in the case at bar because at the time the case at bar arose there was no distinction between the status of a full-blood Creek and a mixed-blood Creek and there was no such distinction until the Act of April 26th, 1906, became effective.

In the case of *Ross* v. *Wertz*, 172 Pac. 968, this court in speaking of the land of a Creek allottee who

died in 1903, under the same law governing the case at bar, said, with reference to the case of *Shultis*, v. *McDougal*, 170 Fed. 529, 95 C. C. A. 615:

> "The controlling idea in the opinion is that it was the purpose of Congress and of the Indians to preserve such property only to members of the tribe. The holding in that case has become a rule of property in the state, and has been accepted, if not endorsed, by the Supreme Court of the United States."

McDougal v. *McKay*, 237 U. S. 372, 59 L. ed. 1001;
Pigeon v. *Buck*, 237 U. S. 386, 59 L. ed. 1007.

The effect of the opinion of the Supreme Court of Oklahoma is to deny the children of an Indian mother their right of inheritance till the life estate of the husband by curtesy is terminated by his death. We respectfully submit that its judgment should be reversed.

S. P. Freeling,
Claude A. Niles,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1091.

B. A. MARLIN, PETITIONER,

vs.

JOHN LEWALLEN AND LUCY CONDREN,
RESPONDENTS.

RESPONSE OF JOHN LEWALLEN AND LUCY CONDREN TO THE APPLICATION OF B. A. MARLIN FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Come now the respondents, John Lewallen and Lucy Condren, and for their response to the petition of B. A. Marlin, petitioner, say:

That the petition, as filed by the petitioner herein, fails to comply with the rules of this Court in the following particulars:

FIRST.

That said petition fails to state any Federal question conferring jurisdiction upon this Court.

SECOND.

That said petition erroneously sets forth the date on which the Supreme Court of the State of Oklahoma rendered judgment herein.

For a further response to said petition, these respondents say:

That on the 12th day of May, 1925, the Supreme Court of the State of Oklahoma reversed the trial court by the decision rendered on that date (not yet officially reported), but appearing in 241 Pac., at page 826, holding in substance that:

> "The Act of Congress of May 2, 1890, put in force in the Indian Territory the common law of England as adopted by the State of Arkansas, except as to Indians and their estates. Act of Congress of June 7, 1897, extended the law to all persons in the Indian Territory, irrespective of race, and title by curtesy consummate as it existed in the State of Arkansas attaches in favor of the husband to the lands of which his wife died seised; and that part of Section 6 of the Act of Congress of June 30, 1902 (32 Stat. at L., 500), reading: '*Provided*, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the

> Creek Nation,' does not prohibit a white man, who is a non-citizen of the Creek Nation, from asserting his curtesy right to the lands of his deceased wife, who was a Creek citizen, where they lived upon the land, had children born alive to them and the wife died seised during coverture."

Subsequent to the rendition of this opinion the petitioner herein filed in the State court his petition for a rehearing, which said petition was by said court, on the 1st day of December, 1925, denied, and mandate of such court was duly issued on the 9th day of December, 1925 (Record, p. 36*b*), received in the trial court December 10, 1925, and duly spread of record therein on the 21st day of December, 1925, no effort being made by the petitioner herein to take any steps in the supreme court with reference to this proceeding until subsequent to the 1st day of March, 1926.

That the decision and judgment of the Supreme Court of the State of Oklahoma is correct and in harmony with the decisions of this Court and the decisions of the Supreme Court of the State of Oklahoma.

Haukins vs. Stevens, 21 Okla., 849; 97 Pac., 567.
Kenoly vs. Hauley, 84 Okla., 120; 202 Pac., 494.
In re Byford's Will, 65 Okla., 159; 165 Pac., 194.
Armstrong vs. Wood, 195 Fed., 137.
Potter vs. Wadsworth, decided Feb. 9, 1926. (Not yet officially reported.)

WHEREFORE respondents pray, in the alternative, that the petition of the petitioner herein be denied, but

that in the event that said petition is granted that petitioner herein be required to supersede the judgment and decree of the Supreme Court of the State of Oklahoma, as is required by section 6 of rule 35 of this Court.

MARTIN E. TURNER,
Eufaula, Oklahoma, Attorney for Respondent.

KIRK B. TURNER,
HARRY B. PARRIS,
Eufaula, Oklahoma, of Counsel.

BRIEF.

The propositions of law as outlined on page 37 of the petitioner's brief correctly state the questions involved in this action, except that, as the situation presents itself to the respondents, there are three separate propositions of law involved:

First.

UNDER THE LAW IN FORCE IN THE INDIAN TERRITORY ON NOVEMBER 29, 1904, THERE WAS AMPLE PROVISION FOR AN ESTATE BY THE CURTESY IN THE CREEK NATION.

Second.

THAT SUCH ESTATE OR RIGHT WAS NOT ABRIDGED OR LIMITED, OR DID NOT FALL WITHIN THE TERMS OF THE PROVISO, TO THE SUPPLEMENTAL CREEK AGREEMENT, WHICH

PROVIDES THAT "ONLY CITIZENS OF THE CREEK NATION, MALE OR FEMALE, AND THEIR CREEK DESCENDANTS SHALL INHERIT LANDS OF THE CREEK NATION."

THIRD.

THAT THE PROPOSITIONS OF LAW NUMBERED 1ST AND 2D HEREIN HAVE BEEN THE ESTABLISHED LAW IN THE STATE OF OKLAHOMA SINCE THE 9TH DAY OF SEPTEMBER, 1908, AND THAT THE DECISIONS OF THE SUPREME COURT OF THE STATE OF OKLAHOMA IN THE CASE OF HAWKINS VS. STEVENS, 21 OKLA., 849; 97 PAC., 56, AND SUBSEQUENT CASES, HAVE BECOME A RULE OF PROPERTY IN THE STATE OF OKLAHOMA.

First Proposition.

UNDER THE LAW IN FORCE IN THE INDIAN TERRITORY ON NOVEMBER 29, 1904, THERE WAS AMPLE PROVISION FOR AN ESTATE BY THE COURTESY IN THE CREEK NATION.

Counsel for petitioner concede that the first proposition herein set out has been decided in the affirmative by the Supreme Court of the State of Oklahoma and the Federal courts in the cases of

Armstrong vs. Wood, 195 Fed., 137;
Pierce vs. Ellis, 51 Okla., 710,

and other cases, but contend that the rule there announced is erroneous, in that the Court failed to construe the Act of May 1, 1901, known as the Original

Creek Agreement, which, they contend, not only superseded the Arkansas law of descent and distribution in force in the Creek Nation prior to statehood, but superseded all of the laws of the State of Arkansas which were in force in the Creek Nation prior to that act. That portion of the act applicable is:

> "SECTION 28. * * * The lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Section 6 of the Act of Congress of June 30, 1902 (32 Stat. L., 500), known as the Supplemental Creek Treaty, provides:

> "The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation."

If counsel for the petitioner are correct in their assumption that the Act of March 1, 1901, repealed all of that portion of the Act of Congress of June 7, 1897, extending the laws of Arkansas to all persons in the

Indian Territory, irrespective of race, then there may be some merit to the application here, for the very good reason that under the laws of Arkansas no provision was made for the surviving husband, except by reason of the estate by the courtesy, and we cannot concede that it was the intention of Congress to exclude the surviving husband from all rights or estate in the lands allotted to his wife, regardless of whether or not the husband was a citizen or non-citizen of the Creek Nation.

Second Proposition.

THAT SUCH ESTATE OR RIGHT WAS NOT ABRIDGED OR LIMITED OR DID NOT FALL WITHIN THE TERMS OF THE PROVISO TO THE SUPPLEMENTAL CREEK AGREEMENT, WHICH PROVIDES THAT "ONLY CITIZENS OF THE CREEK NATION, MALE OR FEMALE, AND THEIR CREEK DESCENDANTS SHALL INHERIT LANDS OF THE CREEK NATION."

In addition to the authorities cited in the opinion of the Supreme Court of the State of Oklahoma, which appears at page 26 of the record as filed by the petitioner, respondents call the attention of the Court to the following cases:

Haukins vs. Stevens, 21 Okla., 849; 97 Pac., 567.

Beam vs. United States et al. (C. C. A.), 162 Fed., 260.

Parr et al. vs. United States et al., 153 Fed., 462.

Randall vs. Krieger, 23 Wall., 137; 23 L. Ed., 124.

McDaniel vs. Grace, 15 Ark., 465.

Prior to the passage of the Act of Congress of March 1, 1901, the laws applicable in the Creek Nation were:

> "That the general laws of the State of Arkansas in force at the close of the session of the General Assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, or in conflict with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide, that is to say, the provisions of the said General Statutes of Arkansas relating to Administration; * * * to Common and Statute Law of England, Chapter Twenty; to Dower, Chapter Fifty-two, * * * Section 31, Act of May 2, 1890 (26 Stat. L., 81).

Under the provisions of this act these laws were not applied to the Indians. By the provisions of the Act of Congress of June 7, 1897 (30 Stat. L., 83), it was provided:

> "* * * The laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective to race. * * *"

So that prior to the Act of March 1, 1901, no doubt existed, or could exist, but that the surviving husband was entitled to the curtesy estate, regardless of whether or not he was of Creek Indian blood.

Under the provisions of the Act of March 1, 1901, the Creek laws of descent and distribution were substituted for those of Arkansas. The applicable provision of the Creek law being:

> "The lawful or acknowledged wifet of a deceased husband shall be entitled to one-half of the estate, if there be no children, and a child's part, if there should be children, in all cases where there is no will. The husband surviving shall inherit of deceased wife in like manner." Sec. 267, Constitution and Laws of the Muskogee Nation as compiled and codified by A. P. McKellop under Act of October 15, 1892.

It is apparent that no restriction of blood was placed upon the husband's right of inheritance by those statutes. Presumably Congress was familiar with its acts passed at prior sessions and was also familiar with the laws of the Creek Nation as they existed on March 1, 1901, and on June 30, 1902, the date of the passage of the Supplemental Creek Agreement. On the date of the passage of the Supplemental Creek Agreement, and prior thereto, neither Congress nor the Creek Nation had by any act or word disclosed any intention to interfere with or take away the right of the surviving husband to an estate by the curtesy. It is equally apparent that it was not their intention to so interfere by the passage and approval of the Supplemental Creek Agreement, because by the provisions of that act non-citizens were only prevented from inheriting lands of the Creek Nation. That an estate by the curtesy is not an estate of inheritance is well settled

by this and all other courts. Mr. Justice Swayne, in *Randall vs. Krieger*, 23 Wall., 137; 23 L. Ed., 124, says:

> "By the common law, where there was no ante-nuptial contract, certain incidents belong to the relation. (Marriage relation.)
>
> "Among them, where the estate of tenant by the curtesy on the part of the husband if issue was born alive and he survived the wife; and on her part, dower if she survived the husband."

Prior to the adoption of the Supplemental Creek Agreement and all other acts of Congress herein referred to, Mr. Justice English, of the Supreme Court of the State of Arkansas, in the case of *McDaniel vs. Grace*, 15 Ark., 465, defined the estate by the curtesy as follows:

> "By the common law, tenancy by the curtesy, is an estate for life, created by the act of the law."
>
> "Tenancy by the curtesy is an estate for life, created by the act of the law. * * *
>
> "This estate is not peculiar to the English law, as Littleton erroneously supposes, for it is to be found with some modifications, in the ancient laws of Scotland, Ireland, Normandy, and Germany. Sir Martin Wright is of the opinion that curtesy was not of feudal origin, 6 * * *; and he adopts the opinion of Craig, who says, that curtesy was granted out of respect to the former marriage, and to save the husband from falling into poverty, * * *."
>
> Kent's Commentaries, vol. 4, 13th ed., p. 25.

Sir William Blackstone has this to say as to the origin and reason for the curtesy estate:

> "* * * And yet it is not generally apprehended to have been a consequence of feudal tenure, though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands have issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it; * * *"
>
> Jones Blackstone, vol. 1, p. 880.

Justice Poffenbarger, of the West Virginia Supreme Court of Appeals, defines the curtesy estate and the reason for its existence as follows:

> "Curtesy is an estate given by the law for weighty reasons of public policy, not by mere contract. It aids the father in maintaining, caring for, and controlling his children in case of the death of the mother. Such power is given for public as well as private benefit."
>
> *Depue vs. Miller*, 64 S. E., 740; 23 L. R. A. (N. S.), 775.

The record in this case discloses that upon the allotment of the lands here involved to Louisa Lewallen, the wife of John Lewallen, respondent herein, John Lewallen built a house on the land and it was occupied by John Lewallen and Louisa Lewallen and their children, Nora Deere, a child of Louisa Lewallen by a prior marriage, until the death of Louisa Lewallen; that after her death John Lewallen and his children

and step-daughter, Nora Deere, who is now the wife of petitioner, continued to reside upon the land until the marriage of the children, and that John Lewallen now resides upon the land; that Nora Deere, now Marlin, and one of the other children conveyed their interest in the land and claim for rents to the petitioner, B. A. Marlin, during the year 1917 (Record, pp. 15, 16, 17).

Here we have a case of a young white man charged with the custody, care, control, welfare, and education of his Creek children, and yet counsel for petitioner, in face of the law, reason, and public policy, say that, in addition to the misfortune of the death of his wife, he, because he was a squaw man (like the petitioner herein), should be further penalized by being forced to leave his home and possibly scatter his family to satisfy the demands of the Creek Tribe of Indians, which demands, as heretofore pointed out, exist only in the mind of the petitioner, it being apparent that the Creeks themselves had no such intention.

That it has always been the policy of Congress to provide for the estate or right of curtesy in the surviving husband of a deceased Indian allottee regardless of citizenship is well established by the rule announced by the Circuit Court of Appeals for the Ninth Circuit in the case of *Beam vs. United States et al.*, 162 Fed., 260, and in the case of *Parr et al. vs. United States et al.*, 153 Fed., 462; *Wheeler vs. Petite et al.*, 153 Fed., 471, wherein such right was upheld in favor of the non-citizen husband.

It is apparent from the brief of counsel that their chief reliance in this case is based upon the case of

Campbell vs. Wadsworth, 248 U. S., 169, wherein this Court held

> "That the non-citizen widow of a Seminole Indian was not entitled to dower in lands allotted to her deceased husband."

From a reading of this opinion it is clear that the real question involved was the right of the non-citizen daughters of the allottee to inherit, and that the dower right of the widow was only inferentially involved. The court was passing upon their claim to lands allotted to a Seminole Indian who died after December 31, 1899, without having received his allotment. This is the exact situation provided for by section 2 of the Act of Congress of June 2, 1900 (31 St. L., 250), which is:

> "Second. If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas, and be allotted and distributed to them accordingly: • • •"

The Federal courts, as well as the State courts, have frequently held that this section is not a general statute of descent and distribution, but a special statute and applicable only to that class of persons and property therein enumerated. Judge Campbell, in discussing this section, has this to say:

"But the foregoing provision has no relation to cases where the allottee dies after having received his allotment, but is clearly confined in its operation to cases where the allottee dies before receiving his allotment * * *"

Bartlett vs. Okla. Oil Co., 218 Fed., 380-383.

Mr. Justice Kane, of the Supreme Court of Oklahoma, discussing section 2, *supra*, in connection with the Campbell-Wadsworth case, in the case of *Lasiter vs. Ferguson*, 79 Okla., 200; 192 Pac., 197, says:

"The questions presented for review are stated by counsel for plaintiff in error in their brief as follows:

" 'First. Did said land descend to said Cotcha Holatka upon the death of Okfuskey, as his only surviving heir, who was a Seminole citizen, under the applicable law at that time, 1910?'

"* * * Upon the first proposition it is apparent that the trial court was of the opinion that, Okfuskey having died in 1910 after receiving his allotment, the land descended share and share alike to Cotcha Holatka, the Seminole brother of the deceased allottee, and to Leah Okfuskey, his Creek wife, under the laws of descent and distribution of the State of Oklahoma. This holding was undoubtedly in accord with the prevailing judicial opinion of the highest court passing upon the question at the time the judgment was rendered. Bruner *v.* Sanders, 26 Okla. 673, 110 Pac. 730; Heliker-Jarvis Seminole Co. *v.* Lincoln *et al.*, 33 Okla. 425, 126 Pac. 723, and several other cases. This is conceded

by counsel for plaintiff in error, but they contend that all these cases have been overruled by implication by the Supreme Court of the United States in Campbell *v.* Wadsworth, 248 U. S. 169, wherein the facts and the ruling of the Court are stated in the syllabus as follows:

"• • • 'We are unable to agree with counsel that the opinion of the Supreme Court in Campbell *v.* Wadsworth, *supra*, overrules by implication the rule announced by this Court in the cases cited above.

"• • • 'In Heliker-Jarvis Seminole Co. *v.* Lincoln *et al.*, *supra*, this Court, after reviewing at some length the opinion of Bruner *v.* Sanders, held:

"'Chapter 49 of the Laws of Arkansas (Mansf. Dig.), entitled "Descent and Distribution," controls the descent of land allotted to members of the Seminole Tribe of Indians, not of Indian blood, who died on the 23rd day of August, 1903, after receiving his allotment.'

"Under the rule thus announced, the allottee in the Campbell case, *supra*, having died after the 31st day of December, 1899, before receiving his allotment, the devolution of his allotment was governed by the laws of descent and distribution of the state as modified by Section 2 of the Seminole Agreement, as was held by the Supreme Court.

"In Heliker-Jarvis Seminole Co. *v.* Lincoln, *supra*, it was pointed out that prior to the time these opinions were handed down the members of the bar of the Seminole Nation were about equally divided between three theories in regard to the law governing the devolution of

Seminole Allotments. But since the affirmation of the rule announced in Bruner *v.* Sanders, *supra*, it has been pretty generally accepted as a correct interpretation of the law applicable to the devolution of such lands, and we are not aware of any case involving the precise questions thus settled having been taken to the Supreme Court for review. These cases being accepted as the settled law in this jurisdiction for so many years, it is impossible to estimate the great number of real estate transactions that have taken place in the Seminole Nation on the faith of their correctness.

"In these circumstances it is the duty of this Court, on the principle of stare decisis, to adhere to such decisions although the Court may be of the belief, which is not the case, that such decisions are not sound, for when parties have acted upon decisions as settled law, and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract is of less importance than that the rule of property so established should be constant and invariable. 11 Cyc. 755. Believing that the rule laid down by this Court is not subversive of the policy of Congress in dealing with this particular tribe of Indians, and perceiving no conflict between the rule announced by the Supreme Court in Campbell *v.* Wadsworth, *supra*, and the rule announced by this Court in Bruner *v.* Sanders, and the other cases, we are constrained to adhere to the rule announced in our former opinions."

A petition for a writ of certiorari was denied in this case by this Court on December 30, 1920.

Lasiter vs. Ferguson, 254 U. S., 651; 31 S. C., 148; 65 L. Ed., 457.

The case of *Scott vs. Ryal*, 78 Okla., 12; 186 Pac., 206, is one involving a homestead right asserted under and by virtue of the provisions of the Probate Code of the State of Oklahoma and cannot be considered as an authority here. We heartily agree with the opinion in the case of *Zimmerman vs. Holmes*, 59 Okla., 253; 159 Pac., 303, wherein the court held that a conveyance of the curtesy estate by a full-blood Choctaw Indian required the approval of the Secretary of the Interior. The reason thereof is apparent. The husband in that case was conveying a right in the lands, which was a valuable right. The purpose of the approval of the Secretary of the Interior was to see that it was not disposed of for a mere pittance, and we think that decision eminently correct.

Third Proposition.

THAT THE PROPOSITIONS OF LAW NUMBERED FIRST AND SECOND HEREIN HAVE BEEN THE ESTABLISHED LAW IN THE STATE OF OKLAHOMA SINCE THE 9TH DAY OF SEPTEMBER, 1908, AND THAT THE DECISIONS OF THE SUPREME COURT OF THE STATE OF OKLAHOMA IN THE CASE OF HAWKINS VS. STEVENS, 21 OKLA., 849; 97 PAC., 567, AND SUBSEQUENT CASES, HAVE BECOME THE RULE OF PROPERTY IN THE STATE OF OKLAHOMA.

The Supreme Court of the State of Oklahoma in September, 1908, in the case of *Hawkins vs. Stevens*,

21 Okla., 849; 97 Pac., 567, directly passed upon the issues herein involved. The facts were that on the 15th day of June, 1906, Samuel L. Hawkins, a Creek freedman, died seized and possessed of the lands involved in that action intestate, leaving him surviving Babe Hawkins, Angelina Hawkins, and Willie McIntosh, heirs-at-law, and Martha Hawkins, his wife. The court there held:

> "The non-citizen widow of an allottee of a quarter section of land of the Creek Nation, whose husband died in June, 1906, is entitled to dower in his estate, and until it is assigned to her, is entitled to remain in and possess the home or house of her late husband, together with the farm thereto attached, free from all rent."

This case has been repeatedly followed and cited from the time of its rendition down to and including the decision in the case at bar and subsequent to the rendition of the opinion in the case at bar, and on the 9th day of February, 1926, in the case of *Potter vs. Wadsworth* (not yet officially reported), the Supreme Court of the State of Oklahoma again followed that opinion and the opinion in the case at bar. So that these decisions have become a rule of property in the State of Oklahoma, well settled and unquestioned prior to this time, and for that reason alone, if no other, should not be disturbed.

We respectfully submit that the judgment and opinion of the Supreme Court of the State of Oklahoma is

eminently proper and correct, and that the application of the petitioner herein should be denied.

Respectfully submitted,

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KIRK B. TURNER,
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Eufaula, Oklahoma, of Counsel.

[Endorsed:] 31814. No. 1091. In the Supreme Court of the United States. John Lewallen and Lucy Condren, plaintiffs in error, vs. B. A. Marlin, defendant in error. Response of John Lewallen and Lucy Condren to the application of B. A. Marlin for writ of certiorari. Martin E. Turner, Eufaula, Oklahoma, attorney for plaintiff in error.